



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OAR-2014-0533; FRL-9939-91-OAR]**

### **California State Nonroad Engine Pollution Control Standards; Large Spark-Ignition (LSI) Engines; New Emission Standards and In-Use Fleet Requirements; Notice of Decision**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of decision.

**SUMMARY:** The Environmental Protection Agency (EPA) is granting the California Air Resources Board's (CARB's) request for authorization of California's 2008 amendments to its new large spark-ignition nonroad engines regulation (2008 LSI Amendments). EPA is also confirming that CARB's 2010 amendments to its in-use fleet average emission requirements (2010 LSI Fleet Amendments) are within the scope of EPA's prior authorization. This decision is issued under the authority of the Clean Air Act ("CAA" or "Act").

**DATES:** Petitions for review must be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2014-0533. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30

a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: [a-and-r-Docket@epa.gov](mailto:a-and-r-Docket@epa.gov), the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the [www.regulations.gov](http://www.regulations.gov) website, enter EPA-HQ-OAR-2014-0533 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice; the page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

### *A. California's LSI Regulations*

CARB promulgated its first LSI regulations in 1999, applicable to new LSI engines (1999 LSI regulations).<sup>1</sup> The 1999 LSI regulations established exhaust emission standards and associated test procedures for LSI engines based upon engine displacement. The exhaust emission standards applicable to 2002 and subsequent model years (MYs) with displacements up to one liter were identical to the emission standards applicable to California small off-road engines (SORE) with engines greater than or equal to 225 cubic centimeters. CARB subsequently adopted more stringent exhaust emission standards for engines greater than 225 cubic centimeters.<sup>2</sup> CARB adopted its initial off-road LSI fleet operator regulations on May 25, 2006.<sup>3</sup> The fleet operator regulations are designed to address the hydrocarbon and nitrogen oxide emissions from the existing LSI engines operating in California and require fleets to meet certain fleet average emission level (FAEL) standards.<sup>4</sup>

By letter dated June 2, 2014, CARB submitted to EPA its request pursuant to section 209(e) of the CAA, regarding its 2008 LSI Amendments which create two new subcategories of LSI engines: LSI engines with an engine displacement less than or equal to 825 cubic centimeters (cc) ( $LSI \leq 825 \text{ cc}$ ), and LSI engines with an engine displacement greater than 825 cc but less than or equal to one liter ( $825 \text{ cc} < LSI \leq 1.0 \text{ L}$ ). The 2008 LSI Amendments establish exhaust emission standards for new 2011 and subsequent model year (MY) LSI engines in each of these new subcategories and additionally establish more stringent exhaust emission standards for 2015 and subsequent

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<sup>1</sup> EPA granted an authorization for these LSI regulations at 71 FR 29623 (May 15, 2006).

<sup>2</sup> EPA granted an authorization for these LSI regulations at 71 FR 75536 (December 15, 2006).

<sup>3</sup> The term “off-road” is used interchangeably with “nonroad” within this decision.

<sup>4</sup> EPA granted an authorization for these LSI regulations at 77 FR 20388 (April 12, 2012).

MY LSI engines with engine displacements 825 cc <LSI ≤ 1.0 L. The 2008 LSI Amendments also establish evaporative emission standards for 2011 and subsequent MY LSI engines within the two new subcategories, and the amendments provide manufacturers of LSI engines used in vehicles that are similar to off-highway recreational vehicles (OHRVs) the option to use the OHRV test and certification procedures.<sup>5</sup>

CARB also submitted its 2010 LSI Fleet Amendments for confirmation from EPA that such amendments are within the scope of a previous EPA authorization. These amendments are designed to enhance the compliance flexibility provisions of the existing LSI Fleet regulation. They amend the existing limited hours of use (LHU) provisions to exempt equipment that operates no more than 200 hours per year subsequent to January 1, 2011 from the fleet average emission standard requirements of the LSI Fleet regulation. The 2010 LSI Fleet Amendments also extend the existing compliance extension period that is available if CARB has not verified a retrofit emission control system, or if one is not commercially available, from one year to two years and allow for an additional two year extension if a retrofit emission control system remains unavailable. The 2010 LSI Fleet Amendments also include additional provisions that largely clarify existing regulatory provisions or provide additional compliance flexibility (e.g. revising the definitions of “baseline inventory,” “operator,” and “airport ground support equipment”; providing an exclusion for certain inoperable equipment from the FAEL requirements; and providing a clarification of the record keeping requirements and of the FAEL definition).<sup>6</sup>

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<sup>5</sup> CARB adopted the 2008 LSI Amendments on November 21, 2008 (see Resolution 08-42 at EPA-HQ-OAR-2014-0533-0008).

<sup>6</sup> CARB adopted the 2010 LSI Fleet Amendments on December 17, 2010 (see Resolution 10-48 at EPA-HQ-OAR-2014-0533-0024).

## *B. Clean Air Act Nonroad Engine and Vehicle Authorizations*

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for new nonroad engines or vehicles. States are also preempted from adopting and enforcing standards and other requirements related to the control of emissions from non-new nonroad engines or vehicles. Section 209(e)(2) requires the Administrator, after notice and opportunity for public hearing, to authorize California to enforce such standards and other requirements, unless EPA makes one of three findings. In addition, other states with attainment plans may adopt and enforce such regulations if the standards, and implementation and enforcement procedures, are identical to California's standards. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, regulations providing the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards.<sup>7</sup> EPA later revised these regulations in 1997.<sup>8</sup> As stated in the preamble to the 1994 rule, EPA has historically

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<sup>7</sup> 59 FR 36969 (July 20, 1994).

<sup>8</sup> See 62 FR 67733 (December 30, 1997). The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California's determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a), section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).<sup>9</sup>

In order to be consistent with section 209(a), California’s nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California’s nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same “consistency” criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California “standards and accompanying enforcement procedures are not consistent with section 202(a)” of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

In light of the similar language of sections 209(b) and 209(e)(2)(A), EPA has reviewed California’s requests for authorization of nonroad vehicle or engine standards under section 209(e)(2)(A) using the same principles that it has historically applied in reviewing requests for waivers of preemption for new motor vehicle or new motor

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<sup>9</sup> See 59 FR 36969 (July 20, 1994).

vehicle engine standards under section 209(b).<sup>10</sup> These principles include, among other things, that EPA should limit its inquiry to the three specific authorization criteria identified in section 209(e)(2)(A),<sup>11</sup> and that EPA should give substantial deference to the policy judgments California has made in adopting its regulations. In previous waiver decisions, EPA has stated that Congress intended EPA's review of California's decision-making be narrow. EPA has rejected arguments that are not specified in the statute as grounds for denying a waiver:

The law makes it clear that the waiver requests cannot be denied unless the specific findings designated in the statute can properly be made. The issue of whether a proposed California requirement is likely to result in only marginal improvement in California air quality not commensurate with its costs or is otherwise an arguably unwise exercise of regulatory power is not legally pertinent to my decision under section 209, so long as the California requirement is consistent with section 202(a) and is more stringent than applicable Federal requirements in the sense that it may result in some further reduction in air pollution in California.<sup>12</sup>

This principle of narrow EPA review has been upheld by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>13</sup> Thus, EPA's consideration of all the evidence submitted concerning an authorization decision is circumscribed by its relevance to those questions that may be considered under section 209(e)(2)(A).

### *C. Within-the-scope Determinations*

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<sup>10</sup> See *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1087 (D.C. Cir. 1996): "... EPA was within the bounds of permissible construction in analogizing §209(e) on nonroad sources to §209(a) on motor vehicles."

<sup>11</sup> See *supra* note 12, at 36983.

<sup>12</sup> "Waiver of Application of Clean Air Act to California State Standards," 36 FR 17458 (August 31, 1971). Note that the more stringent standard expressed here, in 1971, was superseded by the 1977 amendments to section 209, which established that California must determine that its standards are, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. In the 1990 amendments to section 209, Congress established section 209(e) and similar language in section 209(e)(1)(i) pertaining to California's nonroad emission standards which California must determine to be, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

<sup>13</sup> See, e.g., *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*").

If California amends regulations that were previously authorized by EPA, California may ask EPA to determine that the amendments are within the scope of the earlier authorization. A within-the-scope determination for such amendments is permissible without a full authorization review if three conditions are met. First, the amended regulations must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. Second, the amended regulations must not affect consistency with section 209 of the Act, following the same criteria discussed above in the context of full authorizations. Third, the amended regulations must not raise any "new issues" affecting EPA's prior authorizations.<sup>14</sup>

#### *D. Deference to California*

In previous waiver decisions, EPA has recognized that the intent of Congress in creating a limited review based on the section 209(b)(1) criteria was to ensure that the federal government did not second-guess state policy choices. This has led EPA to state:

It is worth noting...I would feel constrained to approve a California approach to the problem which I might also feel unable to adopt at the federal level in my own capacity as a regulator. The whole approach of the Clean Air Act is to force the development of new types of emission control technology where that is needed by compelling the industry to "catch up" to some degree with newly promulgated standards. Such an approach...may be attended with costs, in the shape of reduced product offering, or price or fuel economy penalties, and by risks that a wider number of vehicle classes may not be able to complete their development work in time. Since a balancing of these risks and costs against the potential benefits from reduced emissions is a central policy decision for any regulatory agency under the statutory scheme

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<sup>14</sup> See "California State Motor Vehicle Pollution Control Standards; Amendments Within the Scope of Previous Waiver of Federal Preemption," 46 FR 36742 (July 15, 1981).



outlined above, I believe I am required to give very substantial deference to California's judgments on this score.<sup>15</sup>

EPA has stated that the text, structure, and history of the California waiver provision clearly indicate both a congressional intent and appropriate EPA practice of leaving the decision on "ambiguous and controversial matters of public policy" to California's judgment.<sup>16</sup>

The House Committee Report explained as part of the 1977 amendments to the Clean Air Act, where Congress had the opportunity to restrict the waiver provision, it elected instead to explain California's flexibility to adopt a complete program of motor vehicle emission controls. The amendment is intended to ratify and strengthen the California waiver provision and to affirm the underlying intent of that provision, i.e., to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.<sup>17</sup>

#### *E. Burden and Standard of Proof*

As the U.S. Court of Appeals for the D.C. Circuit has made clear in *MEMA I*, opponents of a waiver request by California bear the burden of showing that the statutory criteria for a denial of the request have been met:

[T]he language of the statute and its legislative history indicate that California's regulations, and California's determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.<sup>18</sup>

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<sup>15</sup> 40 FR 23103-23104 (May 28, 1975); *see also* LEV I Decision Document at 64 (58 FR 4166 (January 13, 1993)).

<sup>16</sup> 40 FR 23104; 58 FR 4166.

<sup>17</sup> *MEMA I*, 627 F.2d at 1110 (citing H.R.Rep. No. 294, 95 Cong., 1st Sess. 301-02 (1977)).

<sup>18</sup> *MEMA I*, *supra* note 19, at 1121.

The Administrator’s burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: “here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as ‘arbitrary and capricious.’”<sup>19</sup> Therefore, the Administrator’s burden is to act “reasonably.”<sup>20</sup>

With regard to the standard of proof, the court in *MEMA I* explained that the Administrator’s role in a section 209 proceeding is to:

[...]consider all evidence that passes the threshold test of materiality and \*  
\* \* thereafter assess such material evidence against a standard of proof to  
determine whether the parties favoring a denial of the waiver have shown  
that the factual circumstances exist in which Congress intended a denial of  
the waiver.<sup>21</sup>

In that decision, the court considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure.”

Those findings involve: (1) whether the enforcement procedures impact California’s prior protectiveness determination for the associated standards, and (2) whether the procedures are consistent with section 202(a). The principles set forth by the court, however, are similarly applicable to an EPA review of a request for a waiver of preemption for a standard. The court instructed that “the standard of proof must take account of the nature

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<sup>19</sup> *Id.* at 1126.

<sup>20</sup> *Id.* at 1126.

<sup>21</sup> *Id.* at 1122.

of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”<sup>22</sup>

With regard to the protectiveness finding, the court upheld the Administrator’s position that, to deny a waiver, there must be “clear and compelling evidence” to show that proposed enforcement procedures undermine the protectiveness of California’s standards.<sup>23</sup> The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.<sup>24</sup>

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to a waiver request for accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one.”<sup>25</sup>

#### *F. EPA’s Administrative Process in Consideration of California’s LSI Regulations*

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., “California State Motor Vehicle Pollution Control Standards; Waiver of Federal Preemption,” 40 FR 23102 (May 28, 1975), at 23103.

On November 24, 2014, EPA published a *Federal Register* notice announcing its receipt of California's authorization request. In that notice, EPA invited public comment on the 2008 LSI Amendments and the 2010 LSI Fleet Amendments and provided an opportunity to request a public hearing.<sup>26</sup>

EPA requested comment on the amendments, as follows: (1) Should California's amendments be considered under the within-the-scope analysis, or should they be considered under the full authorization criteria?; (2) If those amendments should be considered as a within-the-scope request, do they meet the criteria for EPA to grant a within-the-scope confirmation?; and (3) If the amendments should not be considered under the within-the-scope analysis, or in the event that EPA determines they are not within the scope of the previous authorization, do they meet the criteria for making a full authorization determination?

EPA received no written comments. Additionally, EPA received no requests for a public hearing. Consequently, EPA did not hold a public hearing.

## **II. Discussion**

California requested that the Administrator grant a full authorization for its 2008 LSI Amendments and that such amendments meet the three authorization criteria found in section 209(e)(2)(A) of the CAA. We received no adverse comment or evidence suggesting that these amendments fail to meet any of the full authorization criteria.

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<sup>26</sup> See "California State Nonroad Engine Pollution Control Standards; Small Off-Road Engines Regulations; Tier 4 Off-Road Compression-Ignition Regulations; Exhaust Emission Certification Test Fuel for Off-Road Spark-Ignition Engines, Equipment, and Vehicles Regulations; Request for Within-the-Scope and Full Authorization; Opportunity for Public Hearing and Comment," 79 FR 27801 (November 24, 2014).

California also requested that the Administrator confirm that the 2010 LSI Fleet Amendments detailed above are within the scope of a previously granted full authorization. California asserted that the 2010 LSI Fleet Amendments met all three within-the-scope criteria, i.e. that the amendments: (1) do not undermine the original protectiveness determination underlying California's regulations; (2) do not affect the consistency of the regulations with section 202(a); and (3) do not raise any new issues affecting the prior authorizations. We received no adverse comments or evidence suggesting a within-the-scope analysis is inappropriate, or that the 2010 LSI Amendments fail to meet any of the three criteria for within-the-scope confirmation.

Our analysis of the 2008 LSI Amendments in the context of the full authorization criteria, and our analysis of the 2010 LSI Fleet Amendments in the context of the within-the-scope criteria, is set forth below.

#### *A. California's Protectiveness Determination*

Section 209(e)(2)(A)(i) of the CAA instructs that EPA cannot grant a full authorization if the agency finds that California was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards. CARB's Board made a protectiveness determination in Resolution 08-42, finding that California's 2008 LSI Amendments will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.<sup>27</sup> CARB presents that

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<sup>27</sup> "BE IT FURTHER RESOLVED that the Board hereby determines, pursuant to section 209(e)(2) of the federal Clean Air Act that the emission standards and other requirements related to the control of emissions adopted as part of these regulations are, in the aggregate, at least as protective of public health and welfare as applicable federal standards, that California needs the adopted standards to meet compelling and extraordinary conditions, and that the adopted standards and accompanying enforcement procedures are consistent with the provisions in section 209." CARB, Resolution 06-11. This Resolution also extends to

California's exhaust emission standards applicable to  $LSI \leq 825$  cc and  $825 \text{ cc} \leq LSI \leq 1.0$  L are at least as protective of public health and welfare as applicable federal exhaust emission standards. Similarly CARB's Executive Officer found that California's evaporative emission requirements applicable to 2011 and subsequent MY engines less than or equal to one liter are, in the aggregate, at least as protective as applicable federal standards.<sup>28</sup>

EPA did not receive any comments challenging California's protectiveness determination. Therefore, based on the record before us, EPA finds no evidence in the record that demonstrates California was arbitrary and capricious in its determination that its 2008 LSI Amendments are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

Similarly, CARB's 2010 LSI Fleet Amendments must not undermine California's previous determination that its standards, in the aggregate, are as protective of public health and welfare as applicable federal standards. In adopting the 2010 LSI Fleet Amendments CARB made a protectiveness determination in Resolution 10-48, finding that California's 2010 LSI Fleet Amendments do not undermine the Board's previous determination that the California emission standards, other emission related requirements, and associated enforcement procedures are, in the aggregate, at least as protective of public health and welfare than applicable federal standards.<sup>29</sup>

EPA did not receive any comments challenging California's determination that its 2010 LSI Fleet Amendments do not undermine California's prior protectiveness

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CARB's amendment requiring LSI engines used in vehicles similar to OHRVs to utilize OHRV test procedures. EPA-HQ-OAR-2014-0533-0008.

<sup>28</sup> CARB Executive Order G-14-014, EPA-HQ-OAR-2014-0533-0033.

<sup>29</sup> CARB Resolution 10-48, EP-HQ-OAR-2014-0533-0024.

determination. Therefore, based on the record before us, EPA finds no evidence in the record that demonstrates California was arbitrary and capricious in its determination that its 2010 LSI Fleet Amendments do not undermine California's prior protectiveness determination.

*B. Need for California Standards to Meet Compelling and Extraordinary Conditions*

Section 209(e)(2)(A)(ii) of the Act instructs that EPA cannot grant a full authorization if the agency finds that California "does not need such California standards to meet compelling and extraordinary conditions." This criterion restricts EPA's inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.<sup>30</sup> In its Resolution 08-42, CARB affirmed its longstanding position that California continues to need its own nonroad engine program to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same "geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems."<sup>31</sup> Furthermore, no commenter has presented any argument or evidence to suggest that California no longer needs a separate nonroad engine emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California an authorization for its 2008 LSI Amendments under section 209(e)(2)(A)(ii). EPA's within-the-scope determinations, applicable in this instance to CARB's request for its 2010 LSI Fleet Amendments, does not require an EPA analysis under section 209(e)(2)(A)(ii).

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<sup>30</sup> See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

<sup>31</sup> 49 FR 18887, 18890 (May 3, 1984); *see also* 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

### *C. Consistency with Section 209 of the Clean Air Act*

Section 209(e)(2)(A)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C). Similarly, EPA's analysis for within-the-scope determinations includes an assessment of whether the amendments are consistent with section 209.

#### *1. Consistency with Section 209(a)*

To be consistent with section 209(a) of the Clean Air Act, California's 2008 LSI Amendments and 2010 LSI Fleet Amendments must not apply to new motor vehicles or new motor vehicle engines. California's LSI regulations expressly apply only to off-road vehicles and do not apply to engines used in motor vehicles as defined by section 216(2) of the Clean Air Act.<sup>32</sup> No commenter presented otherwise. Therefore, EPA cannot deny California's request on the basis that California's 2008 LSI Amendments and 2010 LSI Fleet Amendments are not consistent with section 209(a).

#### *2. Consistency with Section 209(e)(1)*

To be consistent with section 209(e)(1) of the Clean Air Act, California's 2008 LSI Amendments and 2010 LSI Fleet Amendments must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB notes that its LSI regulations do not affect such permanently preempted vehicles or engines.<sup>33</sup> Therefore, EPA cannot deny California's request on the basis that California's LSI amendments are not consistent with section 209(e)(1).

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<sup>32</sup> CARB, Request for Authorization at 16, and 23. EPA-HQ-OAR-2014-0533-0003.

<sup>33</sup> *Id.*



### 3. Consistency with Section 209(b)(1)(C)

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air Act effectively requires consistency with section 202(a) of the Act. California standards are inconsistent with section 202(a) of the Act if there is inadequate lead-time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that timeframe. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if federal and California test procedures conflicted. The scope of EPA's review of whether California's action is consistent with section 202(a) is narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedures.<sup>34</sup>

#### a. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.<sup>35</sup> Section 202(a)(2) states, in part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. The latter scenario also requires the

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<sup>34</sup> *MEMA I*, 627, F.2d at 1126.

<sup>35</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

Administrator to decide whether the cost of developing and applying the technology within that time is feasible. Previous EPA waivers are in accord with this position.<sup>36</sup> For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead-time to implement that technology.<sup>37</sup> Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.<sup>38</sup>

CARB presents that the technology required to comply with its LSI regulations is feasible, and that it has provided sufficient lead-time, giving consideration to the cost of compliance.<sup>39</sup>

EPA did not receive any comments suggesting that CARB's standards and test procedures are technologically infeasible. Consequently, based on the record, EPA cannot deny California's full authorization (for the 2008 LSI Amendments) based on technological infeasibility. Also, EPA cannot deny California's within-the-scope request for the 2010 LSI Fleet Amendments based on technological infeasibility.

#### b. Consistency of Certification Procedures

California's standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and

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<sup>36</sup> See, e.g., 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

<sup>37</sup> 41 FR 44209 (October 7, 1976).

<sup>38</sup> H.R. Rep. No. 95-294, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 301 (1977).

<sup>39</sup> CARB, Request for Authorization at 17-21, 23.

federal testing requirements using the same test vehicle or engine.<sup>40</sup> CARB presents that there is no issue regarding test procedure inconsistency for new LSI engines as California's test procedures were not modified since EPA's prior waiver.<sup>41</sup> CARB also presents that its 2010 LSI Fleet Amendments do not include any test procedures and thus do not create an inconsistency issue.

EPA received no comments suggesting that CARB's LSI regulations pose any test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on the criterion of consistency with section 209.

#### 4. New Issues

In the context of the 2010 LSI Fleet Amendments, CARB states that it is not aware of any new issues affecting the previously granted authorization for CARB's LSI Fleet regulations. "The Amendments do not create new, more stringent emission standards or requirements, nor force any change in technology to warrant revisiting conclusions in granting the existing authorization."<sup>42</sup> EPA received no comment on this issue. We therefore do not find any new issues raised by the 2010 LSI Fleet Amendments.

#### *E. Authorization Determinations for California's LSI Amendments*

After a review of the information submitted by CARB, EPA finds no basis for denying CARB's full authorization request for the 2008 LSI Fleet Amendments and EPA finds no basis for denying CARB's request that EPA confirm the 2010 LSI Fleet Amendments are within the scope of a prior EPA full authorization. For these reasons,

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<sup>40</sup> See, e.g., 43 FR 32182 (July 25, 1978).

<sup>41</sup> 79 FR 29623 (May 23, 2006). See also CARB, Request for Authorization at 21.

<sup>42</sup> CARB, Request for Authorization at 23.

EPA finds that a full authorization for California's 2008 LSI Amendments should be granted and a within-the-scope determination should be granted for California's 2010 LSI Fleet Amendments.

### **III. Decision**

The Administrator has delegated the authority to grant California section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's LSI amendments, CARB's submissions, and the lack of any comment or adverse comment, EPA is granting a full authorization to California for its 2008 LSI Amendments and a within-the-scope determination for its 2010 LSI Fleet Amendments.

This decision will affect persons in California and those manufacturers and/or owners/operators nationwide who must comply with California's requirements. In addition, because other states may adopt California's standards for which a section 209(e)(2)(A) authorization has been granted if certain criteria are met, this decision would also affect those states and those persons in such states. See CAA section 209(e)(2)(B). For these reasons, EPA determines and finds that this is a final action of national applicability, and also a final action of nationwide scope or effect for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

### **IV. Statutory and Executive Order Reviews**

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Date: December 1, 2015.

Janet G. McCabe  
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Office of Air and Radiation  
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